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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1965

~~No. 1~~ 1042

JULIAN G. CARR

Petitioner

vs.

THE UNITED STATES

Respondent

Petition for Writ of Certiorari to the Court of Claims of the United States

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Petitioner, Captain Julian G. Carr, prays that a writ of certiorari issue to review an order of the Court of Claims of the United States wherein motion for summary judgment was entered in favor of the government, pursuant to an interpretation of Amendatory Section 415 to the Career Compensation Act of 1949.

OPINION OF THE LOWER COURT.

No opinion was rendered by the Court of Claims.

Order in dismissal of plaintiff's original petition after oral argument, and denial of his motion for rehearing can be found in the certified transcript of record filed herewith. (R. 50, R. 71)*

*Numerals following the "R" designation refer to pages contained in the transcript of record.

JURISDICTION OF THIS COURT,

The order presented for review was dated and entered June 18, 1965, by the Court of Claims of the United States. On October 15, 1965 that Court denied petitioner's motion for rehearing and to alter judgment. On December 23, 1965 this Court granted a sixty day extension of time in which to file certiorari petition.

This Court has jurisdiction to review the order complained of by writ of certiorari, under interpretations of Article 1, Section 7, Constitution of the United States (R. 38, 39)—The Congressional Purpose is plain and the effect has not been given according to its terms. (R. 8, 9, Chap. 15)

QUESTIONS PRESENTED FOR REVIEW.

1. Did Congress intend that Amendatory Section 415 to the Career Compensation Act of 1949 should reverse the entire statute, and that in violation to the most emphatic rules of law, its provisions should apply prospectively for some and retrospectively for another?

2. Can the actual letter of an amendatory act defeat its own clear purpose and render whole saving clauses of the original act inoperative?

STATUTE INVOLVED.

The Career Compensation Act of 1949. 63 Stat. 816
Section 415

"Any member who, on the *effective date* of

this Act, *is* a hospital patient and who within six months of the *effective* date of this Act is retired as a result of a physical disability growing out of the injury or disease for which he *was* hospitalized as of *the date of enactment* of this Act, may elect to receive retirement benefits computed under the laws in effect on the date preceding *the date of enactment* of this Act." Emphasis supplied.

Amendatory Section 415 64 Stat. 158, 37 USCA 285

"Any member who, on October 1, 1949, was a hospital patient and who, prior to January 1, 1951, is retired as the result of a physical disability growing out of the injury or disease for which he was hospitalized, may elect to receive retirement benefits computed under the laws in effect on September 30, 1949."

Saving Sections 515(a), 519, and 520 will be found in the Appendix.

STATEMENT OF CASE.

HISTORY

Petitioner initiated his suit in the Court of Claims after four years' effort in which hope for administrative relief was exhausted.

The sole question is one of Congressional Intent, which requires a determination of whether two calendar

dates, those of "September 30, 1949" and "October 1, 1949", which have transposed Amendatory Section 415 to the Career Compensation Act of 1949, represent inept Congressional language.

FACTS.

Petitioner, while serving on active duty as an officer in the Air Force of the United States was hospitalized on October 10, 1949, while suffering from a liver disease which led to his retirement on June 30, 1950. He was not permitted to elect under Amendatory Section 415 which saved a law providing 75 percent retirement pay, and which was in effect on the date of his retirement proceedings, but was retired with 30 percent base pay. Disability was "total" and "permanent". (R. 70)

Petitioner was without knowledge of the actual date of enactment of the statute, until May, 1960. He immediately thereafter sought administrative relief. (R. 49)

The Career Compensation Act of 1949 was approved by the President on October 12, 1949. In the closing chapter of the Act "October 1, 1949" was selected as the "effective date" on which the new pay increases began to accrue to every member of the uniformed services. *"October 1, 1949" was selected before the bill was presented to the President — at a time when "the date of enactment" was unknown and while the Act was subject to veto.* (R. 8)

Section 415 saved a law which was concurrently repealed by the Act. Repeal and preservation both took effect at the same moment of approval on October 12, 1949 (R. 38). The old retirement law which was saved by Section

415 is discussed in the following extract from the legislative history:

> "The second major change deals with retirement for physical disability. For a great many years it has been the practice to retire an officer who is found physically incapable of active military service, and pay him a compensation equal to 75 percent of his base and longevity pay. *No differentiation was made as to the actual degree of disability, so long as it was sufficient to constitute an incapacity for active service.*" (P. 2092, US Code Congressional Service, First Session, 81st Congress, 1949). Emphasis supplied.

The law discussed above was repealed because of its abuse (R. 45). Section 415 saved the entitlement so that it was not disturbed by the Career Compensation Act, but remained in effect and intact for the following six months, just as it had existed since 1861. Section 415 protected every officer who was a hospital patient on "the date of enactment", and who was suffering from an injury or disease which led to his retirement. The government has denied petitioner's eligibility under the old law, asserting that it required a "percentage" of disability (R. 67). The fact that the old law required no percentage of disability was chiefly responsible for its repeal (R. 45).

Amendatory Section 415 extended the retirement privilege for an additional nine months, because the original section had not been duly "promulgated" (R. 7). Amendatory Section 415 is retroactive and it has been construed by the Court of Claims in keeping with its exact letter.

The provisions of Section 411 were not brought to the attention of the Court of Claims. This chapter is necessary in reply to the government's statement that Section 415 pertained to members "theretofore retired" (R. 25). In the words of Congress Sec. 411 stated in part:

> "MEMBERS OR FORMER MEMBERS HERETOFORE RETIRED FOR PHYSICAL DISABILITY
>
> "Section 411
>
> "Any member or former member of the uniformed services heretofore retired by reason of physical disability and now receiving or entitled to receive retired or retirement pay— may elect within the five-year period following the effective date of this title— to qualify for disability retirement pay under the provisions of this Act and, dependent on his qualification, shall be entitled to receive either the disability retirement pay or the disability severance pay prescribed in this title—".

Section 519 protected the entitlements of every member indicated above throughout "the date of enactment"— "notwithstanding the provisions of this Act" (appendix). Under the provisions of Section 411 every officer who had been retired either on or before October 12, 1949, and was receiving under the old 75 per cent retirement law, was given a period of *five years* in which he could elect to either keep his old pay or take under the Career Compensation Act.

ARGUMENT.

As part of an act which will not permit retroactive construction or the disturbance of any old law, prior to its "date of enactment", Amendatory Section 415 to the Career Compensation Act of 1949 has been construed retroactively, and permitted to take away on "October 1, 1949", a law which Congress took extreme care to save from repeal on "October 12, 1949". Provisions of the original act applied equally and alike to every member of the uniformed services, and petitioner will rest his claim on the law and the principles of law fairly embraced in the contents of pages 69 and 70 of the enclosed certified transcript—that the Court will not permit an act to look into the past for two conflicting and irreconcilable purposes—to give every member of the services unaccrued pay, and to retroactively destroy a vested pay entitlement.

Amendatory Section 415 which has no coherence or support outside the narrow confines of its own text, has been construed by the Court of Claims with strict adherence to its exact retroactive letter. Amendatory words have been accepted without any regard to the Congressional Purpose, or to the impossible significance of these words when they are considered as part of an entire act.

The old 75 percent retirement law which was repealed by the Act was kept alive, and remained in full force and effect for certain officers. Section 415 protected every officer whose injury or disease had been officially recognized at the time the old law was withdrawn; who was an actual hospital patient on "the date of enactment", and suffering from an injury or disease which was to end the patient's military career and bring about his retirement

within six months thereafter. Congress realized that such officers were already lost to the services, and that each had indeed already qualified under the old law before it was taken away, except for the formality of a retirement which was inevitable. In every respect, petitioner qualified under the provisions of Section 415 during the six months while it was in effect (R. 70).

The bill was approved by the President and enacted into law on October 12, 1949. This Court and the Court of Claims, in interpretations of the Constitution, have held that the time of approval is the earliest moment on which such an act can take effect (R. 38). "October 1, 1949", is a date which is backward in time and one which is of necessity under the Act or its Amendment, *a retroactive date.* One cannot look backward in time to a prospective date, as counsel for government has argued (R. 24 & 25).

Amendatory Section 415 extended the law which had been prospectively saved from repeal on October 12, 1949, for nine months into the future or throughout the entire year of 1950, thereby assuring eligible members ample time in which to exercise the retirement privilege (R. 7). Simultaneously, *the Amendment reaches back into the past, and requires that a member must have been hospitalized on "October 1, 1949"*— a retroactive date theretofore restricted to the start of "increases" (R. 8) or "pay, allowances or benefits" (R. 61).

October 12, 1949 was "the date of enactment" of the statute and the date it began to exist. Section 415 and other saving clauses distinctly *contrast* "the date of enactment" with the "effective date". The latter date pertained

to pay increases only. *The Amendatory Act faces both the future, January 1, 1950, and the past, October 1, 1949.* The Amendment is prospective for some, but has retrospectively destroyed for petitioner, a vested pay entitlement. Counsel for government has stated that a vested right cannot pertain to the future (R. 24). This opinion is not shared in the law (R. 63).

Section 415 gave officers who had been hospital patients on "the date of enactment" or on October 12, 1949, an election to retire under the law as it had existed on "the date preceding the date of enactment" or on October 11, 1949. Here, an election was possible because the laws *varied* on these two dates. Amendatory Section 415 gave an officer who was a hospital patient on "October 1, 1949" an election to retire under the law as it had existed on "September 30, 1949". The old laws were in complete force and effect on both of these dates and the Career Compensation Act was not in existence. An *election* is impossible and the offer is absurd (R. 55, 56).

(2) The Amendatory Act did not alter the original purpose of this clause, and it could not affect other saving chapters of the statute (R. 48). The following extract expresses a cardinal rule of law:

82 CJS, Statutes, Section 384, P. 869

> "Amendments are to be construed together with the original act to which they relate as constituting one law".

Saving Section 520 had no function other than to assure the preservation of every old pre-existing law which

had been saved from repeal on "*the date of enactment*", to "*be continued in full force and effect for such entitlement and for such a time as such entitlement may exist*" (R. 62 and appendix). *This saving clause insures the prospective and vested nature of the entitlement which was extended by Amendatory Section 415.* The judgment of the Court of Claims which upheld the Amendment, did so *in express and direct violation to the vital and unambiguous instruction of Saving Section 520.* (Appendix) In the face of this saving clause, the government has successfully argued that no old disability retirement pay was saved by the new act (R. 67), and that its saving clauses pertained only to members "theretofore retired" (R. 25). This is to deny the plain meaning of a clear text.

The judgment complained of disregards the careful and detailed legislative history, which has discussed at length the purposes of Section 415 and Amendatory Section 415 (R. 7) — a purpose confirmed by Senator Butler when he introduced Section 415 (R. 29).

The obvious reasons for the conflicting calendar dates of Amendatory Section 415 are identical with the glaring and *admitted* errors which stand today, unquestioned in the USCA (R. 59, 60), and petitioner's step-by-step explanations have not been heard (R. 58, 59, 60, 61).

The Act, its history and the Congressional Record will indicate that the "effective date" of "October 1, 1949" was restricted to "increases" (R. 8), and "pay, allowances or benefits" (R. 61). The very sentence wherein "October 1, 1949" was selected, carefully pointed to Saving Section 515, and directed that it should "take effect" on "the date of enactment" (R. 61). "General Saving Subsection

515(a)" is: "A PROVISION TO RETAIN PRESENT COMPENSATION". "Present Compensation", is compensation under the old laws. This crucial saving clause which prohibits the loss of any entitlement prior to "the date of enactment", and forbids all retroactive construction, has been dismissed by the government as "not relevant here" (R. 12). Congressional language has been quoted above and in the appendix since Section 515 in the USCA is incorrect (R. 59, 60)—reflecting an error identical with that of the following Congress that wrote Amendatory Section 415.

Counsel for government has told the Court of Claims that Section 415 did *not* save an old right, but "created a new and fortuitous and prospective right—" (R. 25).

Section 415 created nothing new. The right it saved was 88 years old (R. 53, 54). October 1, 1949 was not fortuitous, but carefully selected (R. 8), and not prospective but retrospective by a period of eleven days.

The government has quoted from the remarks of Senator Butler at the time Section 415 was introduced on September 26, 1949:

> "The purpose— is to give an officer — an opportunity to make his final settlement either under the terms of the present law (the old law) or under the terms of the new act." (R. 15).

Later:

> "No provision of the 1949 act permitted disability retirement under the 'old law'" (R. 67).

The counsel for government stated that plaintiff's contrary assertions were "fallacious" (R. 67).

On July 21, 1964, counsel for government told the Court of Claims:

> "Plaintiff is not entitled to the election privilege because he was not a hospital patient on October 1, 1949". (R. 16)

Later, on August 17, 1964:

> "— nor would he have acquired any right to retirement had he been hospitalized on October 1, 1949". (R. 26).

The judgment under protest was written in disregard to every rule of law contained in the following paragraphs:

C. J. S. STATUTES, VOLUME 82, SECTION 325, PAGE 613

> "In construing a statute, the spirit of the enactment must be considered and the statute should, if possible, be construed in accordance therewith. In pursuance of the general object of giving effect to the intention of the legislature the courts are not controlled by the literal meaning of the language of the statute, but the spirit or intention of the law prevails over the letter thereof, it being generally recognized that whatever is within the spirit of the statute is within the statute although it is not within the letter thereof, while that which is within the letter, although not with-

in the spirit, is not within the statute. Effect will be given he real intention even though contrary to the letter of the law.

"The rule of construction according to the spirit of the law is especially applicable where adherence to the letter would result in absurdity, injustice, or where adherence to the letter of the law would lead to contradictions, or defeat the plain purpose of the act, or where the provisions were inserted through inadvertence.

"In following this rule, words may be modified or rejected and others substituted, or words and phrases may be transposed. So the meaning of general language may be restrained by the spirit or reason of the statute, and may be construed to admit implied exceptions. Apparent inaccuracies and mistakes in the mere verbiage or phraseology will be overlooked to give effect to the spirit of the law."

The following opinion could have been written for this particular case, 60 S.Ct. 1059:

U. S. v. AMERICAN TRUCKING ASSOCIATION

"In interpreting statutes, courts should construe the language so as to give effect to the intent of Congress, and there is no invariable rule for the discovery of that intent. . . .

"To take a few words from their context in a

statute and with them thus isolated to attempt to determine their meaning does not contribute greatly to discovery of legislative intent, particularly in a law drawn to meet many needs of a major occupation.

"There is no more persuasive evidence to the purpose of a statute than the words used by the legislature, and plain meaning of such words may be followed when they are sufficient in and of themselves to determine the purpose but court may look beyond such words to the purpose when the plain meaning leads to absurd or futile results, or any unreasonable result plainly at variance with policy of legislature as a whole."

In a case in point this Court has reversed the Court of Claims. Referring again to that opinion, the following will be found (R. 40), 276 U.S. 160:

U. S. v. MAGNOLIA PETROLEUM CO.,
Supreme Court

"Statutes are not to be given retrospective effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose to do so plainly appears."

This Court quoted with approval the following language used by the Court of Appeals in giving reason why the statute there in question should not have a retroactive application. Other extracts from this same case appear on page 40 of the certified enclosure, 227 U.S. 296, 33 S.Ct. 273, 57 L.Ed., 578:

"WINFREE v. NORTHERN PACIFIC RAILWAY CO.

> "It is a statute which permits recovery in cases where recovery could not be had before, and takes away from the defendant defenses which formerly were available, — defenses which, in this instance, existed at the time when the contract of service was entered into and at the time when the accident occurred."

Amendatory Section 415 denies recovery where recovery could be had before, and takes away from petitioner an entitlement which formerly was available — in this instance, an entitlement which existed at the time when the contract of service was entered into, and for six months after the disability occurred.

The principles of law wherein petitioner claims entitlement under the Career Compensation Act are no less elementary than the reasons for our bicameral system, and for provisions of the Constitution which require that the President shall first approve a bill before it can take effect (R. 38, 39). These reasons are identical to the refusals offered by every court of law in giving retroactive meaning to a conflicting statute, or in giving effect to an act which would retroactively disturb a vested right, unless the intent to do so is clear.

The statutes are unaltered and petitioner's rights are no less clear today, than in 1950 when he was wrongfully denied his entitlement under the law. This action is not in the nature of a continuing claim but concerns a vested right which time has not impaired or diminished.

Petitioner quotes from Page 63 of the certified enclosure:

BLACK LAW DICTIONARY, PAGE 1735 — VESTED RIGHTS

"which cannot be interfered with by retroactive laws, or interests which it is proper for the state to recognize and protect and of which individual cannot be deprived arbitrarily without injustice —Immediate of fixed right to present or future enjoyment and one that does not depend on an event that is uncertain."

— — —

LEMLY v. U.S. 75 F.Supp. 284 Ct. Cl.

From words and phrases, permanent edition: " . . . an employee . . . has vested interest in retirement pay which cannot be destroyed, weakened, or departed from by subsequent legislation".

Section 415 saved an old retirement law that protected petitioner and every officer in his category who was a hospital patient on October 12, 1949 — the "earliest possible moment" on which the Act could take effect (R. 38). Amendatory Section 415 prolonged the same right for some, but retroactively withdrew it from petitioner on October 1, 1949, thereby cutting off this saved entitlement before the Act came into existence. The Amendatory Act is inherently and openly wrongful and utterly repug-

nant to the statute, and the law. Petitioner quotes from the enclosed transcript (R. 48):

50 Am. Jur. 495, 500 Statutes, Section 478.

> " . . . The courts have evolved a strict rule of construction against a retrospective operation and indulge in the presumption that the legislature intended statutes or amendments thereof, enacted by it to operate prospectively only, and not retroactively —. It is especially true that the statute or amendment will be regarded as operating prospectively only, where it — would destroy a vested right."

The Court of Claims has accepted the Amendment as it stands, in defiance of the Act, its history, and in disregard to and in reversal of every related opinion that has ever been handed down by this Court (R. 39, 40, 47, 48).

CONCLUSION

For the reasons advanced above, this Court is respectfully requested to grant a writ of certiorari herein.

Respectfully submitted,

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APPENDIX

Saving Section 519, 63 Stat. 834.

Title 37, USCA, Section 318,

> "SAVING PROVISION RELATING TO MEMBERS AND FORMER MEMBERS RECEIVING RETIREMENT PAY ON *OCT. 12, 1949*
> "Any member or former member of the uniformed services or any person entitled to the rights, benefits, and privileges of a member or former member of the uniformed services, — who on *October 12, 1949*, is receiving or is entitled to receive retired or retirement pay pursuant to any provision of law, shall, notwithstanding the provisions of this chapter, be entitled to continue to receive or shall continue his entitlement to receive that retired or retirement pay which such member or former member is entitled to receive under any provision of law in effect on the day preceding *October 12, 1949*." Emphasis supplied

Saving Section 520, 63 Stat.

Title 37, USCA, Section 319:

> "SAVING PROVISION RELATING TO LAWS PROVIDING FOR PAY REPEALED BY THIS CHAPTER.
>
> "Any provision of law which, on *October 12, 1949*, entitles any person to be retired, to receive pay, retired pay, retirement pay, or retainer pay, or other monetary benefits, and which is directly repealed, impliedly repealed, or amended by the

provisions of this chapter, shall, if the entitlement of such person to such retirement pay, retired pay, retainer pay, or other monetary benefits is saved by the provisions of this chapter, *be continued in full force and effect for such entitlement and for such a time as such entitlement may exist.*" Emphasis supplied

The closing chapter of the Career Compensation Act, Section 533, states:

"Section 515 of this Act shall *become effective on the date of enactment of this Act.*" Emphasis supplied

PROVISION TO RETAIN PRESENT COMPENSATION

Sec. 515. (a) No member serving on active duty on the effective date of this Act shall— suffer any reduction by reason of this Act in the total compensation which he is entitled to receive under any provision of law in effect on the day immediately preceding such effective date— provided—the provisions of this subsection shall cease to apply—